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In the Supreme Court of the United States

OCTOBER TERM, 1949

Nos. 285-287

E. CLIFFORD HEALD, LOUISE B. HEALD AND BRADLEY HEALD, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 485-495) is reported at 175 F. 2d 878.

JURISDICTION

The judgments of the Court of Appeals were entered July 7, 1949 (R. 495-496), and a petition for a rehearing (R. 497-498), was denied July 28, 1949 (R. 499). The petition for writs of certiorari was filed August 24, 1949. The jurisdiction

of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

The numerous questions into which petitioners' presentation has subdivided the issues here may be summarized as follows:

1. Whether the evidence was sufficient to support the verdict.

2. Whether reversible error was committed during the impanelling of the jury, the conduct of the trial or in the form of the verdict.

3. Whether the Court of Appeals improperly denied petitioners' motion for a remand of the case to the District Court to consider a motion for a new trial on the ground of newly discovered evidence.

STATUTES INVOLVED

The pertinent provisions of the Act of June 22, 1944, c. 268, Title III, §§ 500, 501, 58 Stat. 291, as amended, 59 Stat. 626, 38 U.S.C. 694 and 694a, and of Section 35(A) of the Criminal Code, 18 U.S.C. (1946 ed.) 80, are set forth in the Appendix, *infra,* pp. 23-27.

STATEMENT

Petitioners were indicted under the general conspiracy statute, 18 U.S.C. (1946 ed.) 88, for conspiring to defraud the United States and to violate Section 35(A) of the Criminal Code by causing the Veterans Administration to guarantee, pursuant to 38 U.S.C. 694 and 694a, *infra,* pp. 23-27, a loan

made by the Silver State Savings and Loan Association of Denver, Colorado, on certain residential premises purchased by a veteran from petitioner Bradley Heald (R. 18-22). The object of the alleged conspiracy was to be achieved by falsely representing to the loan company that the selling price of the property was $10,600, its appraised value, which could not by law (38 U.S.C. 694a(3)) be exceeded without destroying eligibility for the loan guaranty by the Veterans Administration. The loan company would thereby be enabled to apply for and receive a government guaranty of part of the loan. In furtherance of the conspiracy, a false contract to sell at the appraised value was submitted to the loan company, whereas the genuine contract specified that the price was $11,500. (R. 18-22.)

Petitioners E. Clifford Heald and Louise B. Heald are the parents of Bradley Heald. The uncontradicted evidence showed that the latter was a builder who had erected a number of houses forming a development known as the Heald Project on land deeded to him by his father and another person (R. 258). By letter dated February 20, 1947, he requested the Veterans Administration to have these houses, which were then in the course of construction, appraised "for the purpose of sale to veterans who may wish to purchase with the assistance of G.I. loan financing" (R. 377). The Veterans Administration appointed a committee of appraisers (R. 378), who inspected the various

premises in the Heald Project (R. 131) and filed their report fixing the reasonable value of each individual house, when completed, at $10,600 (R. 379-384). Although the appraisal and report were made on or before March 1, 1947, the latter was not filed until March 18, 1947, because Bradley Heald had requested delay to permit him to submit additional information which, however, he did not do (R. 380). The appraisal was formally brought to his attention by letter dated April 4, 1947, from the Veterans Administration (R. 384). E. Clifford Heald also knew of this appraisal (R. 212).

On June 13, 1947, in response to a newspaper advertisement offering the houses in the Heald Project for sale at $11,500, John C. Hess, a veteran, and his wife visited Louise B. Heald (R. 63-64), who was selling these houses for her son on a commission basis (R. 266). Mr. Hess inquired whether the houses "would take" a G.I. loan and was told they would (R. 64; see also R. 267). Mr. and Mrs. Hess selected 984 Fairfax St. as the house they wished to purchase and Mr. Hess gave Mrs. Heald a check for $500 as a deposit on account of the $11,500 purchase price (R. 64-65). It was then arranged that on the following day Mr. Hess would come to an office shared by Mrs. Heald and her husband, an attorney, to prepare the formal papers (R. 65, 267).

Mr. Hess testified that the next day, June 14, he saw E. Clifford Heald at the latter's office and both executed a paper dated June 13, 1947, en-

titled "Receipt and Option" for the purchase of 984 Fairfax St. for $11,500 provided that a loan of $9,600 could be obtained (R. 66, 370-371). Heald signed in behalf of "Heald Investment Co., Broker" (R. 371), a trade name used by Mrs. Heald (R. 237).[1] Hess testified further that he then signed, without reading, some additional papers which Heald told him were copies of the first paper (R. 66, 68-69). Two of these, however, were not such copies but the original and a copy of another receipt and option for the same property, dated June 14, 1947, reciting a purchase price of $10,600, and signed, "Heald Investment Co., Broker, Louise B. Heald" (R. 68-70, 372-373). Hess' first knowledge of the contents of this paper, of which he had not been given a copy, came when it was shown to him on the occasion of his appearance before the grand jury (R. 68, 294-295). Mrs. Heald was not present at the signing (R. 271) nor was anyone else other than Hess and E. Clifford Heald (R. 70). Mrs. Heald testified that she was at the office and signed two receipt and option forms in blank on June 14, 1947, prior to the arrival of Hess, and left to attend to some other business (R. 270-271). She had told her husband and son that the price at which she had sold the house was $11,500 (R. 271).

Hess stated that thereafter, in response to a phone call from E. Clifford Heald, he returned to

[1] Some of the following testimony was controverted by one or more of petitioners.

the office on June 26, 1947, and gave him a check for $900 (R. 70-71). On this occasion, Bradley Heald and a person named Dicke, believed to be Bradley's partner, were also present (R. 71).

Some time before the closing of the transaction—the exact date is not clear from the record—Hess and E. Clifford Heald visited the office of the Silver State Savings and Loan Association where Hess, upon Heald's instruction, signed a Veterans Administration Home Loan Report in blank (R. 83, 385-387). Hess stated, "I was advised by Mr. Heald it needed my signature because of the Veteran's application" (R. 84).

The closing was effected on June 27, 1947, at the loan company office (R. 73). Present were Mr. and Mrs. Hess, E. Clifford Heald, Bradley Heald and Otis A. King, president of the loan company (R. 86). The closing statement, signed by Mr. and Mrs. Hess and Bradley Heald, recited a sales price of $10,600 (R. 73). This, Mr. Hess testified, was questioned by Mr. and Mrs. Hess, whereupon E. Clifford Heald "said something about the $900 payment, the down payment, and that's the way it was. Well, besides that there was some other discussion on some other item Bradley Heald and Mr. King were having at the time, and it was sort of passed over. Mr. Heald said that was it, so that was it" (R. 73).

Hess executed a deed of trust to secure the loan of $9,600 made by the loan company (R. 174) and paid $609.02 by check, which represented the $500

balance of the purchase price of $11,500, plus expenses incidental to the closing (R. 74-75). King testified that E. Clifford Heald brought to the closing the original and copy of the receipt and option, reciting the $10,600 price, which he said was the contract to be closed (R. 170-171). The transaction was then closed and a warranty deed executed by Bradley Heald to Mr. and Mrs. Hess (R. 173, 392-394). The revenue stamps, provided by Bradley Heald, were in the sum of $12.65, representing a price of $11,500 (R. 173).

King further testified that at a later date he gave one of the copies of the $10,600 receipt and option to an attorney of the Veterans Bureau (R. 172) and thereafter received a loan guaranty certificate from the Veterans Administration (R. 177, 394-395).

At the trial, after both sides had rested, petitioners moved for a judgment of acquittal, upon which decision was reserved (R. 302-320). Petitioners were found guilty by the jury and the motion was denied (R. 365). E. Clifford Heald was sentenced to serve eight months in jail and to pay a fine of $1,000. Bradley Heald and Mrs. Heald were fined $500 and $100, respectively (R. 368-369).

During the pendency of petitioners' separate appeals, petitioners E. Clifford Heald and Bradley Heald moved in the Court of Appeals for a remand of the case to the District Court for consideration of a motion for a new trial based upon newly dis-

covered evidence (R. 461-485). This motion was denied (R. 493-495) and the convictions were affirmed (R. 485-495).

ARGUMENT

1. Petitioners urge eleven separate grounds of error. Of these, Points 3 to 6, inclusive (Pet. 50-61), which we discuss first, are varied aspects of their position that, as a matter of law, the evidence failed to establish that they were guilty of a criminal conspiracy.

A. Their Point 3 (Pet. 50-53) argues that the motion for judgment of acquittal should have been granted since, the proof being circumstantial, it failed to establish the guilty knowledge essential to the charge. This conclusion, we submit, flies in the teeth of the facts. There was evidence which the jury could and did properly believe, and as to which petitioners do not raise any issue of credibility, that spelled out the conspiracy, not circumstantially, but directly. Much of this evidence was not challenged and some was actually corroborated by one or more of the petitioners themselves.

Thus, the testimony that Bradley Heald and E. Clifford Heald knew of the $10,600 appraisal and that they and Mrs. Heald knew of the sale to Hess at $11,500 stands uncontradicted. The fact that Mrs. Heald signed receipt and option forms in blank which she gave to E. Clifford Heald who inserted a sales price of $10,600 and had Mr. Hess sign them is likewise uncontroverted. Nor is there

any dispute over the fact that the closing statement signed by Bradley Heald recited a sales price of $10,600. That the loan company obtained from the Veterans Administration a guaranty based upon an application showing the selling price as $10,600 is conceded. None of this is circumstantial evidence.

There was, of course, controversy over some vital points in the case. But the jury, quite obviously, chose not to believe petitioners. The evidence which it did believe showed that E. Clifford Heald duped Hess into signing a receipt and option stating the purchase price to be $10,600, which Mrs. Heald had signed in advance, that he brought this to the closing and represented it as the true agreement, and that Bradley Heald joined in this misrepresentation by signing the closing statement which also recited a selling price of $10,600. There was, therefore, ample evidence to support the conclusion that all three petitioners had conspired to represent that the selling price to Hess was $10,600 so that a loan guaranty could be procured from the Veterans Administration.

What petitioners are arguing, however, is that there was no direct evidence that they had made an agreement to deceive.[2] But conspiracies, from their clandestine nature, generally are not provable directly, but only from statements and overt acts and the inferences to be drawn therefrom. E.g.,

[2] They argue, "The direct evidence concerned what the defendants had done, not what they had agreed" (Pet. 50).

Direct Sales Co. v. *United States,* 319 U.S. 703, 714. We submit that here the acts of all three petitioners were so plainly shown to have been in concert as to leave no doubt as to the existence of an agreement.

B. Petitioners argue, however, that, even assuming the existence of the conspiracy, it contemplated a violation of Sections 694 and 694a, Title 38, U.S.C., which are not penal in nature and that, consequently, the conspiracy could not have been one to commit an offense against the United States (Pet. 53-54). This argument overlooks the charge and proof that one of the objects of the conspiracy was to defraud the United States by impairing and obstructing the Veterans Administration in respect of its function of administering the loan provisions of those sections, which is itself an offense under the general conspiracy statute, 18 U.S.C. (1946 ed.) 88. See, e.g., *Glasser* v. *United States,* 315 U.S. 60, 66-67. And it completely overlooks the charge and proof that the conspiracy also had as one of its objects the violation of Section 35(A) of the Criminal Code (now 18 U.S.C. (1948 rev.) 1001), providing for fine and imprisonment for falsifying or concealing a material fact or making or causing to be made any false or fraudulent statements or representations in any matter within the jurisdiction of any department or agency of the United States.

C. Likewise frivolous is petitioners' point that the false representations were not made in a matter within the jurisdiction of the United States (Pet. 54-59). The fact that the representations were made to the loan company and not directly to the Veterans Administration, upon which petitioners rely, is an irrelevancy. To sustain this contention would be tantamount to holding that a conspiracy indictment such as this could not lie so long as someone outside the conspiracy intervened between the Government and the conspirators, regardless of the latters' knowledge of the fraud and their intent that it be perpetrated. This argument, moreover, overlooks the fact that Mr. Hess testified that he signed the Veterans Administration Home Loan Report, which was an application for a loan guaranty, in the presence of E. Clifford Heald and at his direction (R. 83, 385-387). We submit, therefore, that the Court of Appeals was clearly right in holding that passing upon applications for guaranteed loans was within the jurisdiction of the Veterans Administration and that the false representation which petitioners caused to be made came within such jurisdiction (R. 488). *Todorow* v. *United States,* 173 F. 2d 439, 444-445 (C.A. 9), certiorari denied, 337 U.S. 925.[3]

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[3] *Terry* v. *United States*, 131 F. 2d 40 (C.A. 8), relied upon by petitioners (Pet. 55), is readily distinguishable. In that case, the defendant was indicted and convicted of violating Section 35(A) of the Criminal Code by making and causing to be made a certificate containing fraudulent statements in

D. Petitioners also argue that since 18 U.S.C. 694a makes the guaranty of a veteran's loan automatic, they could not have been guilty of conspiring to cause the Veterans Administration to guaranty the Hess loan (Pet. 59-61). As a subsidiary argument they seem to urge that they could not very well sell at a price in excess of the appraised value, thus preventing the guaranty from being effective, and at the same time be conspiring to procure a government guaranty which their own act would make impossible.

The answer to both these contentions is that the guaranty is automatic provided certain conditions are met. One of the conditions is that the selling price must not exceed the appraised value. The Veterans Administration has the duty of determin-

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a matter within the jurisdiction of the Federal Housing Administration. The certificate was procured by the defendant in connection with a sale for which a promissory note was given to a lumber company, which transferred it to the C.I.T. Corporation and which in turn sold it to its parent company, the Commercial Investment Trust, Inc. The latter company obtained insurance thereon from the F.H.A. The Court of Appeals reversed, holding that at the time the defendant procured the fraudulent certificate the matter was not within the jurisdiction of the F.H.A., apparently because the indictment failed to charge and, presumably, there was no proof that there was then any knowledge or intent that the loan would ultimately be insured by F.H.A. The court obviously felt that the intent to defraud the Government had neither been pleaded nor established and its judgment may have been influenced by the fact that the fraudulent certificate passed through the hands of three companies before insurance by the F.H.A. was obtained. Apparently, so far as the defendant was concerned, the matter might or might not ever reach the F.H.A. But, in the case at bar, the indictment charged and the evidence clearly showed that at the time of the conspiracy, petitioners had knowledge that an application for a loan guaranty would, and intended that it should, be made.

ing that the prescribed conditions exist and thereupon to issue a loan guaranty certificate. The object of the conspiracy was to reap the benefit of the guaranty by pretending to comply with the law. In the absence of discovery of the fraud the Government would be in no position to contest a claim under the guaranty.[4] The conspiracy to achieve such a result is punishable under 18 U.S.C. (1946 ed.) 88 and the indictment so charged.

2. All but one of petitioners' remaining contentions involve alleged errors in the selection of the jury, the conduct of the trial, and the form of the verdict.

A. There is no merit in petitioners' objection that the recall of Juror Beuthel, who had been peremptorily challenged by petitioners, was prejudicial error (Pet. 45-47). As the Court of Appeals correctly pointed out both the responsibility and failure to keep track of their peremptory challenges were petitioners' (R. 491). Having exhausted their peremptory challenges and then having improperly challenged this juror peremptorily, it was altogether proper for the trial judge to recall him (see R. 136-137). It was then open to petitioners by further examination to seek to ascertain whether he had been prejudiced by the occurrence

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[4] Section 509(c) of the Act of June 22, 1944, as amended (38 U.S.C. 694j(c)), provides that "The financial transactions of the Administrator incident to, or arising out of, the guaranty of loans pursuant to this subchapter, * * * shall be final and conclusive upon all officers of the Government."

and, if so, to challenge him for cause.[5] They chose, instead, to rest upon the speculative assumption that the mere challenge and recall might have created prejudice in the mind of this juror (R. 60). In the circumstances, the trial court's refusal to allow an additional peremptory challenge on so tenuous and insubstantial a ground was, we submit, a proper exercise of discretion. *Shepard* v. *United States*, 62 F. 2d 683, 684 (C.A. 10).

B. Petitioners assert that proffered testimony of E. Clifford Heald and Bradley Heald was improperly excluded (Pet. 27-32, 47-49). This testimony was apparently intended to show that the Silver State Savings and Loan Association knew, at the time of the closing that the property was being sold to Hess for $11,500 (R. 233), that E. Clifford Heald did not know that the loan company intended to apply to the Veterans Administration for a guaranty of the loan (R. 234), and that he did not know of the June 1947 appraisal (R. 235).[6]

The exclusion of this evidence presents no substantial question. Petitioners were charged with conspiring to cause the Government to guaranty a loan (R. 18-22). In effectuating the conspiracy

[5] Petitioners argue (Pet. 47) that counsel are not permitted to examine prospective jurors in this District Court. This, however, did not preclude them from requesting further inquiry by the court, as they were invited to do earlier in the proceedings (R. 51).

[6] Also objected to is the exclusion of testimony that the loan company had made loans of $9600 on other property in the Heald project without guaranty from the Veterans Administration. The irrelevance of such evidence is clear.

they caused the price to be represented to the Veterans Administration as $10,600 and supplied a contract of sale at that price. Whether or not the loan company actually knew that the true selling price was $11,500 could have no bearing upon their guilt. Conceivably, the loan company could have been willing to submit the application for the government guaranty so long as the company was supplied with a $10,600 contract, even though it knew such contract to be a fraud. Similarly, the purchasers, Mr. and Mrs. Hess, might have deliberately and knowingly joined in the falsification. Far from tending to establish the innocence of petitioners, such evidence would merely point to the participation of additional co-conspirators.

The exclusion of E. Clifford Heald's testimony that he was ignorant of any intention of the loan company to apply for a government guaranty was, at worst, harmless error, since both Bradley Heald and Louise B. Heald protested their innocence of any such knowledge (R. 263, 271) but were nevertheless found guilty. See Rule 52(a), F. R. Crim. P.; *Berger* v. *United States,* 295 U. S. 78, 80.

The June 1947 appraisal of the house sold to Hess, of which E. Clifford Heald attempted to show his ignorance, was, in fact, a report based in part upon and adhering to an appraisal of each of the houses in the Heald project made in February 1947 (R. 102, 110-111), of which, concededly, he and Bradley Heald were fully aware (R. 212, 259). The trial court properly held that the earlier appraisal

limited to $10,600 the price at which the property could be sold without destroying eligibility for a Veterans Administration guaranty (R. 119). Petitioners are not now challenging that ruling. Consequently, the admitted knowledge of the February appraisal makes wholly irrelevant the claimed ignorance of the June report, which also fixed the appraised value at $10,600.

C. The contention that the general verdict of guilty in this case makes it impossible to identify the basis of the conviction (Pet. 61-63) is completely devoid of substance.[7] It rests upon the misconception that petitioners were charged with conspiring to effect three separate and distinct offenses, i.e., violating Section 35(A) of the Criminal Code, violating 38 U.S.C. 694 and 694a, and defrauding the Government by causing it to guarantee the loan. The indictment charged a single conspiracy to defraud the United States and to violate Section 35(A). The fraud consisted of impairing and obstructing the functions of the Veterans Administration in guarantying loans under 38 U.S.C. 694 and 694a and it was an integral part of such fraud that petitioners would cause the loan company to present a false statement to the Government. The dual aspects of the conspiracy, as charged and proved, were inseparable and the proof as to the false statement established also the fraud. Hence, there is no occasion to consider the

[7] It is, morever, raised here for the first time.

question whether the convictions rest upon one of several bases, and *Cramer* v. *United States,* 325 U. S. 1, upon which petitioners rely (Pet. 62-63), is wholly inapposite.

D. Petitioners' complaint concerning voluntary and allegedly prejudicial statements of the witness Ben T. Allison (Pet. 63-64) involves only one statement magnified beyond its real significance. The witness was one of the appraisers of the Heald project. He was being cross-examined by counsel for petitioners concerning a meeting participated in by himself, the other appraisers, Bradley Heald and others. The meeting was had to consider objections of Heald and others that the February 1947 appraisal of the Heald project was too low (R. 162-164). Allison had been asked about a discussion of the appraisal at this meeting (R. 163) and, in the course of his answer, he referred to a statement of Bradley Heald, concerning the appraisers' report of the water condition, to the effect that they "could go dig a hole, each of us, and put a can in it and he would drink all the water that would run in that can" (R. 165). Shortly thereafter the witness volunteered the statement to which objection is taken: "The water that was in the can that he spoke of is now in the basements and the basements are heaving and there is water in most of them" (R. 165). This statement was stricken on petitioners' motion and the jury was instructed to disregard it (R. 167). There had already been some testimony,

without objection, as to the shoddy construction of the houses in the Heald project (R. 156). Thus, while the statement of this witness was not responsive and was therefore properly stricken, it certainly did not warrant declaring a mistrial of a case already well into its second day. Moreover, petitioners made no motion for a mistrial. All they asked was that the offending statement be stricken and their request was granted.

E. Neither is there any substance in petitioners' complaint that the trial court erred in failing to note and correct four statements made by the prosecutor in his summation to the jury (Pet. 65-66; R. 330, 331, 344, 347). Of these, three were perhaps improper because they concerned no issue in the case. The fourth (R. 347), on the other hand, was a fair comment upon the evidence, well within the scope of proper advocacy. Two of the questionable statements were made in the first half of the prosecutor's argument (R. 330, 331). Their impact and seriousness may be judged from the fact that, far from objecting, petitioners' counsel opened his argument with praise of the prosecutor, not only as a lawyer but as a gentleman (R. 332). The other remarks to which petitioners now object were made in the closing part of the prosecutor's argument. But again petitioners failed to object. We submit that the Court of Appeals was entirely correct in finding nothing in the circumstances here to warrant an exception to the rule that an objec-

tion such as petitioners urge, when made for the first time on appeal, is made too late. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 239; *N.Y.C. R.R. Co.* v. *Johnson*, 279 U. S. 310.

F. The claimed errors in the trial court's instructions to the jury (Pet. 66-69) are significant only when read out of context.

Two statements are involved. The first was to the effect that if the defendants or any two of them conspired and one committed any of the overt acts charged then all were guilty (R. 355). That this was nothing but an inadvertence which was corrected is evidenced by the further statement of the Court, "* * * if you think that only two of them conspired, then you are justified in finding a verdict of guilty as to those two and acquitting the third one * * *" (R. 359). The other statement objected to was patently either a slip of the tongue or a typographical error. The record shows (R. 359), "in order to justify an acquittal", when the trial judge clearly intended, "in order to justify a conviction."

These are the sole objections to the charge, a reading of which, we submit, shows that it was altogether clear and more than fair to petitioners. Moreover, petitioners not only failed to object, *Kempe* v. *United States*, 160 F. 2d 406, 411 (C.A. 8), certiorari denied, 331 U. S. 843, but actually indicated their approval of these instructions when

they took their only relevant exception as follows (R. 362):

> [We except] To Your Honor's instruction that two or more make up the conspiracy which, of course, is true, but to the manner in which your Honor instructed in connection with that, namely, that they could convict and acquit one, without pointing out very clearly that they could under the evidence acquit all.

We think that if petitioners had noticed the slips of which they now complain they would not and certainly should not have remained silent. But if, as is more likely the case, they failed to note the errors, it seems reasonable to assume that the jury was not misled.

3. Finally, petitioners urge that the Court of Appeals improperly failed to remand the case to the District Court for consideration of a motion by E. Clifford and Bradley Heald for a new trial based upon newly discovered evidence (Pet. 69-71). The new evidence consisted of evidence adduced in a subsequent trial of E. Clifford and Bradley Heald for the substantive offense of causing a false statement to be presented to the Veterans Administration in connection with the Hess transaction. Petitioners claim that this evidence tended to show that King, the president of the loan company, contrary to his and other testimony at the trial below, knew that the actual sale price to Hess was $11,500.

Petitioners place heavy reliance in their plea for a new trial upon the fact that the trial court charged the jury that if they believed the loan company knew that the selling price was $11,500 and not $10,600 they must bring in a verdict of not guilty (R. 353).

This instruction, we submit, was patently erroneous and one to which petitioners were not entitled. As we have already said (*supra*, p. 15), if the loan company had such knowledge it indicated merely that there were more conspirators than the three who were indicted. That fact, however, would by no means tend to minimize petitioners' guilt. Consequently, the alleged guilty knowledge of King presents no reasonable basis for believing that proof thereof at a new trial would produce a different result with a properly instructed jury. *Long* v. *United States*, 139 F. 2d 652, 654 (C. A. 10); *Evans* v. *United States*, 122 F. 2d 461, 468-469 (C. A. 1). The Court of Appeals' holding to this effect was, therefore, proper (R. 494).[8]

Moreover, the motion for a new trial should properly have been made in the District Court without requesting a remand for that purpose by the Court of Appeals. If that had been done, review of a denial of the motion would have been available to petitioners in the pending appeal. Only if the trial court had been disposed to grant

[8] Corroborative of the correctness of this holding is the fact that at the subsequent trial of E. Clifford and Bradley Heald both defendants were convicted.

the motion would a remand have been necessary. Rule 33, F. R. Crim. P.;[9] *Rakes* v. *United States*, 163 F. 2d 771 (C. A. 4), certiorari denied, 335 U. S. 826.

Finally, petitioners do not seem to be precluded even now from making their application in the District Court.[10]

CONCLUSION

None of petitioners' contentions presents a real issue warranting review by this Court. The petition for writs of certiorari should therefore be denied.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.
ALEXANDER M. CAMPBELL,
Assistant Attorney General.
ROBERT S. ERDAHL,
ISRAEL CONVISSER,
Attorneys.

OCTOBER 1949.

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[9] The notes of the Advisory Committee to Rule 31(c) of the Preliminary Draft (pp. 136-137) and Rule 35 of the Second Preliminary Draft (p. 131), which were the counterparts of the present Rule 33, explain that the procedure was deliberately changed to permit *consideration* of a motion for a new trial on the ground of newly discovered evidence without requiring a remand from the Court of Appeals.

[10] Rule 33 allows two years from "final judgment" for such a motion. The judgments of conviction were entered on July 19, 1948 (R. 35-37).

APPENDIX

The Act of June 22, 1944, c. 268, title III, 58 Stat. 291, as amended, 59 Stat. 626, provides:

Sec. 500 [38 U.S.C. 694].

(a) Any person who shall have served in the active military or naval service of the United States at any time on or after September 16, 1940, and prior to the termination of the present war and who shall have been discharged or released therefrom under conditions other than dishonorable after active service of ninety days or more, or by reason of an injury or disability incurred in service in line of duty, shall be eligible for the benefits of this title. Any loan made by such veteran within ten years after the termination of the war for any of the purposes, and in compliance with the provisions, specified in this title, is automatically guaranteed by the Government by this title in an amount not exceeding fifty per centum of the loan: *Provided,* That the aggregate amount guaranteed shall not exceed $2,000 in the case of non-real-estate loans, nor $4,000 in the case of real-estate loans; or a prorated portion thereof on loans of both types or combination thereof.

(b) Loans guaranteed under this title shall be payable under such terms and conditions as may be agreed upon by the parties thereto, subject to the conditions and limitations of this title and the regulations issued pursuant to section 504: *Provided,* That the liability under the guaranty within the limitations of this title shall decrease or increase

pro rata with any decrease or increase of the amount of the unpaid portion of the obligation: *Provided further,* That loans guaranteed under this title shall bear interest at a rate not exceeding 4 per centum per annum and shall be payable in full in not more than twenty-five years, or in the case of loans on farm realty in not more than forty years: *And provided further,* That (1) the maturity on a non-real-estate loan shall not exceed ten years; (2) any loan for a term in excess of five years shall be amortized in accordance with established procedure; (3) except as provided in section 505 any real-estate loan, other than for repairs, alterations or improvements, shall be secured by a first lien on the realty, and a non-real-estate loan, except as to working or other capital, merchandise, good-will and other intangible assets, shall be secured by personalty to the extent legal and practicable.

(c) An honorable discharge shall be deemed a certificate of eligibility to apply for a guaranteed loan. Any veteran who does not have a discharge certificate, or who received a discharge other than honorable, may apply to the Administrator for a certificate of eligibility. Upon making a loan as provided herein, the lender shall forthwith transmit to the Administrator a statement setting forth the full name and serial number of the veteran, amount and terms of the loan, and the legal description of the property, together with the

appraisal report made by the designated appraiser. Where the loan is automatically guaranteed, the Administrator shall provide the lender with a loan guaranty certificate or other evidence of the guaranty. He shall also endorse on the veteran's discharge, or eligibility certificate, the amount and type of guaranty used, and the amount, if any, remaining. An amount equivalent to 4 per centum on the amount originally guaranteed shall be paid to the lender by the Administrator out of available appropriations, to be credited upon the loan. Nothing herein shall be deemed to preclude the assignment of any guaranteed loan nor the assignment of the security therefor.

(d) Loans guaranteed hereunder may be made by any Federal land bank, national bank, State bank, private bank, building and loan association, insurance company, credit union, or mortgage and loan company, that is subject to examination and supervision by an agency of the United States or of any State or Territory, including the District of Columbia. Any loan at least 20 per centum of which is guaranteed under this title may be made by any national bank, or Federal savings and loan association; or by any bank, trust company, building and loan association or insurance company organized or authorized to do business in the District of Columbia; without regard to the limitations and restrictions of any other statute with respect to —

(1) ratio of amount of loan to the value of the property;

(2) maturity of loan;

(3) requirement for mortgage or other security;

(4) dignity of lien; or

(5) percentage of assets which may be invested in real estate loans.

(e) Any loan proposed to be made to an eligible veteran by any lender not of a class specified in subsection (d) may be guaranteed by the Administrator if he finds that it is in accord otherwise with the provisions of this title, as amended.

Sec. 501 [38 U.S.C. 694a]. Any loan made to a veteran under this title, the proceeds of which are to be used for purchasing residential property or constructing a dwelling to be occupied as his home or for the purpose of making repairs, alterations, or improvements in property owned by him and occupied as his home, is automatically guaranteed if made pursuant to the provisions of this title, including the following:

(1) That the proceeds of such loan will be used for payment of the property purchased or constructed or improved;

(2) That the contemplated terms of payment required in any mortgage to be given in part payment of the purchase price or the construction cost bear a proper relation to the veteran's present and anticipated income and

expenses; and that the nature and condition of the property is such as to be suitable for dwelling purposes; and

(3) That the price paid or to be paid by the veteran for such property or for the cost of construction, repairs, or alterations does not exceed the reasonable value thereof as determined by proper appraisal made by an appraiser designated by the Administrator.

At the time of the alleged conspiracy involved, Section 35(A) of the Criminal Code, 18 U.S.C. (1946 ed.) 80, provided:

> Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious, or fraudulent; or whoever, shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry in any matter

within the jurisdiction of any department or agency of the United States or of any corporation in which the United States of America is a stockholder, shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

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